No. 320 and No. 547.



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1924.

No. 320.

NATIONAL PAPER AND TYPE COMPANY, *Plaintiff in Error*,
*v.*
FRANK K. BOWERS, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK,
*Defendant in Error.*

No. 547.

BARCLAY & CO., INCORPORATED, *Plaintiff in Error*,
*v.*
WILLIAM H. EDWARDS, AS COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK,
*Defendant in Error.*

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

## REPLY BRIEF FOR THE PLAINTIFFS IN ERROR

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The brief for the defendants in error, in its statement of the question therein designated as No. 1 of the questions involved in the two cases at bar, and in the statement of the first point of the argument (which

relates to the second point of the argument for the plaintiffs in error) does not state correctly the contention of the plaintiffs in error in this point. The plaintiffs in error contend, as stated in the complaints and in the second point of their argument, that *by reason of the discrimination set forth therein* the alleged taxation imposed upon the net income or profits of their businesses of manufacturing or purchasing articles in the United States and exporting and selling such articles in foreign countries was a direct burden on and impediment to their said businesses of exporting or their export commerce, in violation of Paragraph 5 of Section 9 of Article I of the Constitution of the United States. The brief for the defendants in error entirely ignores this discrimination in the tax, with respect to this provision of the Constitution. The discrimination in taxation against the export commerce of the plaintiffs in error clearly makes the said alleged tax a direct burden on their export commerce, upon the authority of I. M. Darnell & Son Co. v. Memphis (208 U. S. 113), Woodruff v. Parham (8 Wall. 123), Brown v. Houston (114 U. S. 622), William E. Peck & Co. v. John Z. Lowe, Jr., Collector (247 U. S. 165), and United States Glue Co. v. Oak Creek (247 U. S. 321), as cited in the first brief for the plaintiffs in error.

The statement in the brief for the defendants in error that the Constitutional prohibition against the taxation of exports is narrower than the Constitutional provision forbidding the imposition by a State of a burden upon interstate commerce, is apparently intended to mean that that which constitutes a tax burden upon interstate commerce when imposed by a State would not be a tax burden upon export commerce when

imposed by Congress. This view is contradicted by decisions of this Court, which have repeatedly applied the same rule to State taxes bearing upon interstate or foreign commerce and to Federal taxes bearing upon export commerce. In United States Glue Co. v. Oak Creek (*supra*) this Court applied to interstate commerce with respect to a State tax the rule laid down in William E. Peck & Co. v. John Z. Lowe, Jr., Collector (*supra*) with respect to export commerce as affected by a Federal tax. Both of these cases relate to taxes on net income, and in the former case this Court said that the State tax on net income there considered was not a burden on interstate commerce

> "* * * if there be no discrimination against interstate commerce either in the admeasurement of the tax or the means adopted for enforcing it."

In the cases of the plaintiffs in error there was a discrimination against their export commerce in *the admeasurement of the tax and the means adopted for enforcing it.*

The brief for the defendants in error refers to foreign corporations engaged in the occupation or business of exporting within the United States as *nonresident foreign corporations.* In Paragraph 1 of Section 217 of the Revenue act of 1921 foreign corporations transacting business within the United States are described as *resident foreign corporations,* so that the reference in the brief for the defendents in error to such corporations as "nonresident foreign corporations" would seem to be in conflict with such Act of Congress. In St. Clair v. Cox (106 U. S. 350), this Court said (on p. 355):

> "* * * Whilst the theoretical and legal view that the domicile of a corporation is only in the State where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other States and opened offices and carried on its business there, it was, in effect, as much represented by them there as in the State of its creation. As it was protected by the laws of those States, allowed to carry on its business within their borders and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred."

This view of the status of a corporation transacting business in a State other than that in which it was organized is practically illustrated by the case of Underwood Typewriter Co. v. Chamberlain (254 U. S. 113), wherein this Court dealt with a corporation organized under the laws of Delaware which manufactured its goods in Connecticut and shipped such goods to other States and there sold them. The main office of this corporation was in the city of New York, where necessarily the proceeds of such sales were received, yet this Court held that the net income derived from the goods so manufactured in Connecticut was *earned* in Connecticut.

With respect to this matter, it is of interest to note that in the lower court's opinion in the case of Shaffer v. Carter, 252 U. S. 37 (Shaffer v. Howard, District Court, E. D. Oklahoma, 250 Fed. 873), it was said (on p. 876):

> "* * * If, through accident or design, an individual dwells in one State, while his business is in part or wholly located in other states, so that

> he needs, commands, and receives the protection of several states, can his income therefrom escape imposition? It may be true that the State which protects the person of the one who creates, receives, or enjoys an income may require of him therefor a tax measured by his ability to pay from his entire income. That is no reason why the state which protects the business which contributes to his income may not also demand, as pay for that protection, a tax measured by that part of his income which came from that business. If in the one case the State of residence can tax the right to create, receive, and enjoy an income, why can not another State tax his right to create and receive an income from business within its borders?"

This principle was affirmed by this Court in its opinion in that case when brought here on appeal, and this Court said:

> "* * * That the state, from whose laws property and business and industry derive the protection and security without which production and gainful occupation would be impossible, is debarred from exacting a share of those gains in the form of income taxes for the support of the government, is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement. That it may tax the land but not the crop, the tree but not the fruit, the mine or well but not the product, the business but not the profit derived from it, is wholly inadmissible."

And it was also declared by this Court that the business and property in Oklahoma belonging to Shaffer the nonresident were *the source of the net income* that

was taxed by Oklahoma, although the products of that business were removed from and sold outside of that State. This Court said (on p. 59 of its opinion):

> "Laying aside the probability that from time to time there may have been changes arising from purchases, new leases, sales, and expirations (none of which, however, is set forth in the bill), it is evident that the lien will rest upon the same property interests which were the source of the income upon which the tax was imposed."

These citations are a sufficient answer to the assertion in the brief for the defendants in error that the net income of the plaintiffs in error with which the cases at bar are concerned, and the like net income of the foreign corporations carrying on like business in the United States, are from sources within foreign countries. And this assertion, so contrary to fundamental principles, is again explicitly contradicted by this Court in William E. Peck & Co. v. John Z. Lowe, Jr., Collector (*supra*), wherein this Court determined the status of the net income referred to, whether of American or of foreign corporations, saying (on p. 175):

> "• • • The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins. If articles manufactured and intended for export are subject to taxation under general laws up to the time they are put in course of exportation, as we have seen they are, the con-

> clusion is unavoidable that the net income from the venture when completed, that is to say, after the exportation and sale are fully consummated, is likewise subject to taxation under general laws. In that respect the status of the income is not different from that of the exported articles prior to the exportation."

The tax on net income which was dealt with by this Court in that case was imposed by the Federal Income Tax Law of 1913 on the net income of both American and foreign corporations derived from the business of exporting carried on within the United States, which business, as stated by this Court, consisted of "buying goods in the several States, shipping them to foreign countries and there selling them." In the first briefs for the plaintiffs in error citations were given from the Federal income tax laws of 1894, 1909 (Corporation Tax Law), and 1913, showing that under these statutes, as well as under earlier income tax laws of the United States, foreign corporations were taxed upon their net income accruing with respect to "business transacted and capital invested" in the United States, and that under these provisions foreign corporations were taxed on their net income from the business of exporting transacted within the United States. It is a matter of official record in the Treasury Department that such net income of such foreign corporations was taxed under these prior statutes as required by said statutes. The brief for the defendants in error suggests that to tax such net income of the foreign corporation or nonresident alien is to tax income beyond the jurisdiction of the United States; but such jurisdiction has been repeatedly exercised under said prior income tax laws

and has never before been questioned. It can not be questioned now, since such net income has the same status in the United States as have articles intended for exportation before exportation begins. It is also settled by repeated decisions of this Court, cited in the first briefs for the plaintiffs in error, that within the taxing jurisdiction the tax must fall alike upon all those engaged in like occupations and under like circumstances and conditions, in order that the so-called tax may actually be a tax and not an arbitrary exaction in violation of due process of law.

The statement in the brief for the defendants in error concerning the extent of the power of Congress to tax with the limitations stated, have no application to the cases of the plaintiffs in error, since such power to tax, beyond the admitted exception as to exports, is not challenged in the cases at bar. It is not the power to tax, but the power to impose an arbitrary exaction in the guise of a tax, that is challenged as a violation of due process of law. The brief for the defendants in error cites the statement of this Court in Brushaber v. Union Pacific R. Co. (240 U. S. 1) that "the due process clause of the Fifth Amendment * * * is not a limitation upon the taxing power conferred upon Congress," but omits the words of this Court, speaking by Mr. Chief Justice White, which immediately follow this statement and must be taken therewith in order to state accurately the doctrine laid down by this Court. These words of this Court are:

> "* * * And no change in the situation here would arise even if it be conceded, as we think it must be, that this doctrine would have no application in a case where, although there was a seeming exercise

> of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property; that is, a taking of the same in violation of the 5th Amendment; or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."

It has been clearly shown in this and the first briefs filed for the plaintiffs in error that this Court, in its decisions affirming the power of the States to tax net income derived from interstate and foreign commerce transacted within their borders by nonresident individuals and corporations foreign to such States, has established principles which contradict the contentions of the defendants in error. If such contentions could be sustained the effect would be to reverse the decisions of this Court in such cases as Shaffer v. Carter (*supra*), Underwood Typewriter Co. v. Chamberlain (*supra*), United States Glue Co. v. Oak Creek (*supra*), and other like decisions, upholding the power of the States to tax net income from business transacted and capital invested within the States by such nonresident individuals and foreign corporations, regardless of where the products of such business are sold.

Respectfully submitted,

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